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THE HONORABLE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

THOMAS PEREZ, Secretary of Labor, United States Department of Labor, Plaintiff, vs. LANTERN LIGHT CORPORATION, d/b/a ADVANCED INFORMATION SYSTEMS, a corporation; DIRECTV LLC, a limited liability company; and RAMON MARTINEZ, an individual, Defendants.	CASE NO. 2:12-CV-01406-RSM **DEFENDANT DIRECTV LLC'S OPPOSITION TO INTERVENOR'S MOTION TO UNSEAL SUMMARY JUDGMENT EXHIBITS** Note on Motion Calendar: May 5, 2017 **ORAL ARGUMENT REQUESTED**

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I. INTRODUCTION

DIRECTV opposes Washington Wage Claim Project's Motion to Unseal Summary Judgment Exhibits ("Motion to Unseal"), Dkt. No. 172, as to most—though not all—of the sealed summary judgment exhibits at issue. This Court should deny the Motion as to the majority of such sealed exhibits.

In particular, based on DIRECTV's careful review, eight of the sealed exhibits no longer need to remain sealed due to the passage of time and another four of the sealed exhibits could be re-filed in redacted form instead of remaining sealed; this combined set of 12 exhibits is specifically identified in Section III.A, below. Therefore, DIRECTV would not object to the Court ordering the unsealing of such eight exhibits, and the unsealing and re-filing in redacted form of such four exhibits.

This Court should deny the Motion to Unseal as to the remaining sealed summary judgment exhibits (herein the "Sealed Confidential Documents") because they continue to contain DIRECTV's extremely sensitive and confidential and proprietary business information not known to the public. Disclosing the Sealed Confidential Documents to the public would place DIRECTV at an unfair competitive disadvantage, displaying to service providers and business competitors the Company's pricing and rate information, and revealing DIRECTV's business processes and strategies for evaluating its customers' satisfaction and service providers. These compelling reasons for maintaining confidentiality of the Sealed Confidential Documents outweigh the WWCP's and public's interest in disclosure.

II. PROCEDURAL HISTORY

On August 20, 2012, the Department of Labor ("DOL") filed this action against defendants Lantern Light Corporation d/b/a Advanced Information Systems ("AIS") and DIRECTV. *See* Dkt. No. 1. The DOL alleged that AIS and DIRECTV engaged in violations of the Federal Labor Standards Act of 1938 ("FLSA"). *Id.*

On December 4, 2014, this Court granted the parties' stipulated Protective Order. *See* Dkt. No. 86. Thereafter, in reliance upon this Protective Order, the parties engaged in discovery. During discovery, pursuant to the Protective Order, DIRECTV undertook a careful review of the documents and marked as "Confidential" those documents containing sensitive proprietary and third party information.

On March 19, 2015, the parties filed a Joint Stipulated Motion to Seal Exhibits to Dispositive Motions, Responses and Replies Thereto ("Joint Stipulated Motion to Seal"). In such Motion, the parties asked the Court to seal specific exhibits from DIRECTV's production of documents that were identified as "Confidential" consistent with the Protective Order. *See* Dkt. No. 115. This Court granted the Joint Stipulated Motion to Seal on March 25, 2015. *See* Dkt. No. 133. In reliance upon the Court's grant of the Joint Stipulated Motion to Seal, the DOL and DIRECTV filed various exhibits under seal in support of their cross-motions for summary judgment on the issue of whether DIRECTV was a joint employer. *See* Dkt. Nos. 121, 126, 145. On May 29, 2015, this Court granted the DOL's motion for partial summary judgment. *See* Dkt. No. 158. Thereafter, the parties agreed to resolve this matter via a consent judgment, which the Court entered on October 15, 2015. *See* Dkt. No. 167.

Now, more than a year and a half after this litigation has concluded, the WWCP belatedly seeks to intervene to unseal the exhibits to the parties' cross-motions for summary judgment.

III. LEGAL ARGUMENT

WWCP argues that it has a right to the Sealed Confidential Documents under both the federal common law right of access and the First Amendment. However, access to judicial records is "not absolute" and it yields to other interests. *Kamakana v. City and Cty. of Honolulu*, 447 F.3d 1172, 1178-79 (9th Cir. 2006). The federal common law right of access cedes where there is a compelling reason to keep a document sealed. *Id. at* 1180 ("'[C]ompelling reasons' must be shown to seal judicial records attached to a dispositive motion." *Id. at* 1179. The scope of the First Amendment right of access is even more limited. In addition to a showing that the balancing of competing interests weighs in favor of disclosure, documents are subject to the First Amendment right of access only if: (1) the class of documents sought has historically been open to the public; and (2) access to the documents plays a "significant positive role in the functioning of the particular process in question." *Press-Enterprise Co. v. Super. Ct.*, 478 U.S. 1, 8 (1986). Under these standards, the Sealed Confidential Documents should remain as such.

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A. As a Preliminary Matter, DIRECTV Does Not Oppose The Motion as to the Unsealing of 8 Specific Exhibits, and Unsealing and Redaction of 4 Other Exhibits.

DIRECTV has carefully reviewed the documents WWCP seeks to have unsealed. Due to the passage of more than a 1 ½ years since this matter concluded, certain documents no longer need to remain sealed. Therefore, DIRECTV does not object to the unsealing of the following documents:

- Exhibits H, L, M, P, Z, FF, GG to the DOL's Motion for Partial Summary Judgment. Dkt. No. 121.
- Exhibit B to the DOL's Reply in Support of Motion for Partial Summary Judgment. Dkt. No. 145.

Similarly, DIRECTV does not oppose the unsealing and filing of redacted versions of the following documents in lieu of their complete sealing:

- Exhibits B, CC, and DD to the DOL's Motion for Partial Summary Judgment. Dkt. No. 121.[1]
- Exhibit A to DIRECTV's Motion for Summary Judgment. Dkt. No. 126.[2]

B. DIRECTV's Compelling Reasons For Keeping The Remaining Exhibits Sealed Outweighs The WWCP's and the Public's Interests In Disclosure.

Generally, "compelling reasons" to seal a court record exists when such a record "might [] become a vehicle for improper purposes, such as the . . . release [of] trade secrets." *Kamakana,* 447 F.3d at 1179. Compelling reasons also exist if sealing is required to prevent a record from

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[1] WWCP argues that Exhibit B (Dkt. No. 116) to the DOL's Motion for Partial Summary Judgment should be unsealed because the same document was previously filed publicly as Exhibit II to the DOL's Motion for Partial Summary Judgment (Dkt. No. 121). However, WWCP is incorrect. A comparison of these two documents reveals major differences. Exhibit B contains sensitive pricing information, the release of which would put DIRECTV at a competitive disadvantage. *See* Dkt. No. 116, at 39. Exhibit B also contains an amendment to the agreement. *Id.* at 40–42. Exhibit II does not contain this sensitive pricing information or this agreement amendment. Therefore, DIRECTV stipulates to filing a version of Exhibit B which redacts all of the sensitive information in lieu of keeping it sealed.

[2] This exhibit is the same as Exhibit B to the DOL's Motion for Partial Summary Judgment. Dkt. No. 121. Therefore, footnote 1 is applicable to this exhibit as well.

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being used as a source of business information to harm a litigant's competitive standing. *See, e.g.*, *In re Electronic Arts, Inc.*, 298 F. App'x 568, 569–70 (9th Cir. 2008).

The United States Court of Appeals for the Ninth Circuit has stated that district courts must "conscientiously balance[] the competing interests" of the public and the party who seeks to keep the judicial records sealed. *Kamakana*, 447 F.3d at 1179 (quoting *Foltz v. State Farm Mut. Auto Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003)). *See also EEOC v. Erection Co.*, 900 F.2d 168, 170 (9th Cir. 1990) (holding that in determining whether to allow access to records, courts should consider the "public interest in understanding the judicial process and whether disclosure of the material could result in improper use of the material . . . .").

1. DIRECTV Has Compelling Reasons To Keep The Exhibits Sealed.

This Court, like other district courts, possesses broad power to issue orders that require "confidential research, development, or commercial information not be revealed or be revealed only a specified way." Fed. R. Civ. P. 26(c)(1); 26(c)(1)(G). *See also Phillips v. Gen. Motors Corp.*, 307 F.3d 1206, 1211 (9th Cir. 2002) (district courts have "broad latitude to grant protective orders to prevent disclosure of materials for many types of information, including, but not limited to, trade secrets or other confidential research, development, or other commercial information.") (emphasis omitted).

Protection of a litigant's legitimate commercial and privacy interests ultimately serves the "truth finding" goal of discovery procedures and facilitates disposition of each case on its full merits. *See In re Adobe Sys., Inc. Sec. Litig.*, 141 F.R.D. 155, 161–62 (N.D. Cal. 1992) ("Protective orders and filings under seal are the primary means by which the courts ensure full disclosure of relevant information, while still preserving the parties' … legitimate expectation that confidential business information, proprietary technology and trade secrets will not be publicly disseminated.").

DIRECTV has a legitimate, protectable interest in the information presented in the Sealed Confidential Documents. The supporting declaration of Marc Mastin, DIRECTV's Director of Network Services for Washington and other states demonstrates compelling reasons to maintain under seal each Sealed Confidential Document. *See* Declaration of Marc Mastin In Support of

DIRECTV's Opposition to Intervenor's Motion to Unseal Summary Judgment Exhibits ("Mastin Decl."), ¶¶ 3–16. Certain of the Confidential Sealed Documents reveal strategic considerations for DIRECTV concerning a potential commercial transaction involving a DIRECTV business partner. (Mastin Decl., ¶¶ 4, 15.) Others reveal DIRECTV's pricing information (Mastin Decl., ¶¶ 3, 13–14)[3], and internally-developed processes and procedures, such as supply chain logistics issues and strategies related to how performance metrics are measured. (Mastin Decl., ¶¶ 3, 5, 6–9, 12–14). If DIRECTV's competitors were to acquire this information, they could unfairly use this information to DIRECTV's competitive disadvantage.

Courts confronting similar issues have shown that they are loathe to reveal these types of strategic business documents. *See In re Electronic Arts, Inc.*, 298 F. App'x 568, 569–70 (9th Cir. 2008) (finding that "compelling reasons" may exist if sealing is required to prevent judicial documents from being used "as sources of business information that might harm a litigant's competitive standing." (internal citations omitted). In *Adobe*, for example, the court explained its refusal to publicly release similar data:

> Many of the documents produced to plaintiffs contain sensitive information regarding Adobe's business and marketing strategy, which, if made public, will educate Adobe's competitors as to how Adobe conducts its business and what its future plans are. Many of these documents are forward-looking and therefore remain sensitive even though they were created one or two years ago.

Adobe, 141 F.R.D. at 162. *See also Electronic Arts*, 298 F. App'x at 569–70 (holding that the district court committed clear error in its application of the "'compelling reasons' standard" to a licensing agreement, which contained pricing terms, royalty rates, and guaranteed minimum payment terms, sealing exhibits, and finding that defendant would be irreparably damaged if such information was released to the public); *Microsoft Corp. v. Motorola, Inc.*, No. C10-1823JLR, 2012 WL 5476846, at *4 (W.D. Wash. Nov. 12, 2012) (granting defendant's motion to seal trial exhibits containing business planning and financial information).

[3] As discussed in section III.A., DIRECTV stipulates to redacting the exhibits discussed in ¶¶ 3, 13 of the Mastin declaration.

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This Court's own precedent shows its willingness to regularly seal this type of strategic information that could harm a party's competitive standing. *See Bittitan, Inc. v. Skykick, Inc.*, No. C15-0754RSM, 2015 WL 12159149, at *1 (W.D. Wash. Aug. 14, 2015) (using the "compelling reasons" standard to seal documents which contained proprietary information that had "the potential to harm the parties' positions in the industry."); *Bite Tech, Inc. v. X2 Biosystems, Inc.*, No. 12-1267-RSM, 2013 WL 1399349 (W.D. Wash. Apr. 5, 2013) (sealing various documents under the "compelling reasons" standard that contained proprietary and strategic business information); *Nat'l Products, Inc. v. Aqua Box Products, LLC*, No. C12-605 RSM, 2013 WL 12106901 (W.D. Wash. Mar. 25, 2013) (finding compelling reasons to seal defendant's financial information, as it could harm defendant's competitive position with respect to future business).

2. WWCP Cannot Show A Countervailing Legitimate Public Interest In The Sealed Exhibits.

While DIRECTV has demonstrated compelling reasons to keep these exhibits under seal, the WWCP cannot show a countervailing public interest in their disclosure. Generally, the public's interest in viewing documents attached to pleadings is to better understand the judicial process. *EEOC v. Erection Co.*, 900 F.2d at 170 (in determining whether to seal documents, the court should consider the "public interest in understanding the judicial process."); *Richmond Newspapers, Inc. v. Va.*, 448 U.S. 555, 597 (1980) (public access to judicial proceedings is grounded in public interest in aiding accurate factfinding).

Here, the WWCP argues that unsealing the exhibits serves the public interest by shedding light on the joint employer relationship analysis. But, the WWCP does not explain how unsealing exhibits, which contain proprietary business information that will harm DIRECTV's competitive standing if revealed, will assist the public in understanding how the joint employer analysis was conducted here. Indeed, all that is needed to understand how this Court reasoned through the joint employer issue is to review this Court's order discussing its analysis, which already discusses the relevant portions of the exhibits at issue. *See* Dkt. No. 158. Unsealing these

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exhibits will not add to the public's or the WWCP's understanding of the joint employer relationship issue. It will, however, unnecessarily harm DIRECTV.

C. WWCP Is Not Entitled To These Documents Under The First Amendment.

In order to gain access to court records under the First Amendment, the WWCP must first demonstrate that it has a right to access such records. *See Courthouse News Serv. v. Planet*, 750 F.3d 776, 786 (9th Cir. 2014). To evaluate a claim of a First Amendment right of access, the court must first determine: (1) whether historical experience counsels in favor of public access to these records; and (2) whether public access would play a "significant positive role in the functioning of the particular process in question." *Press-Enterprise Co. v. Super. Ct.*, 478 U.S. 1, 8 (1986); *Courthouse News Serv.*, 750 F.3d at 786; *In re Wash. Post Co.*, 807 F.2d 383, 389 (4th Cir. 1986) ("In deciding whether the *First Amendment* right of access extends . . . both the Supreme Court and the courts of appeal have looked to two factors: historical tradition and the function of public access in serving important public purposes.").

WWCP fails to show either of these elements here. Indeed, although *Courthouse News Service* extended the First Amendment right of access to civil proceedings, none of the cases following *Courthouse News Service* in the Ninth Circuit have addressed the issue of whether this right to access extends to sealed business records of a company.

Moreover, even if the WWCP could make this showing, it must not be allowed to access the exhibits because DIRECTV has a compelling interest in keeping them sealed, there is no alternative to sealing, and there is a substantial probability that unsealing the documents would harm DIRECTV's compelling interest. *Perry v. Brown*, 667 F.3d 1078, 1088 (9th Cir. 2012) (outlining test for restrictions on First Amendment access).[4]

As discussed in section III.B.1, DIRECTV has a compelling interest in keeping the various exhibits sealed. Specifically, unsealing the various exhibits will reveal confidential and proprietary business information to the public that would harm DIRECTV's competitive standing.

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[4] The WWCP's reliance on the standard outlined in *Perry v. Brown* is misleading. In holding that compelling reasons existed to seal the material at issue, the *Perry* court held that a First Amendment analysis would not affect the result it reached. 667 F.3d 1078, 1088 (9th Cir. 2012). Thus, the *Perry* court did not even reach the question of whether the documents were subject to the First Amendment. *Id.*

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In addition, upon receiving WWCP's Motion to Intervene and Motion to Unseal, DIRECTV conducted a careful analysis of the exhibits filed under seal. As discussed in section III.A., DIRECTV has determined that certain of these exhibits could be unsealed, and that certain of these exhibits could be redacted in lieu of sealing. In contrast, for the remaining Confidential Sealed Documents, no alternative to sealing exists.

If the Confidential Sealed Documents are unsealed, there is a substantial probability of harm to DIRECTV's compelling interest of protecting its legitimate commercial interests. *See* Mastin Decl., ¶¶ 3–16. In recent years, news about wage and hour lawsuits involving technicians has been commonly reported in the media.[5] The past media coverage of this specific litigation, including via Law360, renders it highly likely that it would obtain media attention again—delivering DIRECTV's sensitive, proprietary information into the hands of its vendors and competitors, who will be alerted to the unsealed information.

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[5] *See*, *e.g.*, Adam Lidgett, *Cox Louisiana Let Out Of Technician's Overtime Suit*, LAW360 (Apr. 6, 2017), https://www.law360.com/articles/909759/cox-louisiana-let-out-of-technician-s-overtime-suit; Adam Lidgett, *9th Circ. Reverses Company's Quick Win In FLSA OT Suit*, LAW360 (Mar. 21, 2017), https://www.law360.com/articles/904565/9th-circ-reverses-company-s-quick-win-in-flsa-ot-suit; Chuck Stanley, *Calif. Cable Techs Win Class Cert. In TWC Suit Over Pay*, LAW360 (Jan. 4, 2017), https://www.law360.com/articles/877153/calif-cable-techs-win-class-cert-in-twc-suit-over-pay; Chuck Stanley, *Texas Cable TV Co. Reaches $750K Deal To End FLSA Suit*, LAW360 (Dec. 22, 2016), https://www.law360.com/articles/876125/texas-cable-tv-co-reaches-750k-deal-to-end-flsa-suit; Adam Lidgett, *Settlement In Comcast Techs' OT Wages Suit Gets Judge's OK*, LAW360 (June 28, 2016), https://www.law360.com/articles/811381/settlement-in-comcast-techs-ot-wages-suit-gets-judge-s-ok.

IV. CONCLUSION

For the foregoing reasons, DIRECTV respectfully requests that the Court deny the WWCP's Motion to Unseal, at least as to the Confidential Sealed Documents.

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